No. 73-492

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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

against

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (GRAND DUCHESS OF SAXONY-WEIMAR),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE RESPONDENT EDWARD I. ELICOFON IN RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This reply brief is submitted on behalf of the respondent Edward I. Elicofon in response to the Memorandum for the United States as *amicus curiae* filed on January 17, 1974.

The Memorandum was submitted in response to the Court's order of December 3, 1973, inviting a brief expressing the views of the United States. The statement of these views, under the heading "Discussion", occupies two paragraphs of the Memorandum at pages 4 and 5, and their substance may be even more succinctly summarized in the following three points:

1. The two decisions of the district court, in 1970 and 1972,[1] and the decision of the court of appeals in April 1973 affirming them, were "correctly decided on the record as it then stood."

2. "[T]he relationship between the Federal Republic and the GDR has undergone significant changes" since the commencement of the litigation in 1969.

3. The Executive Branch "would not object" if the Kunstsammlungen zu Weimar were permitted to intervene in the action begun by the Federal Republic.

With all deference, the Memorandum provides no acceptable basis for the action by this Court which it suggests and omits to note points important for this Court's consideration of the pending petition, thus necessitating this reply.

1. It continues to be the fact that the United States has not recognized the East German regime.

In the Memorandum the Solicitor General pointedly has not taken up the labored contention in the Supplemental Brief of the Kunstsammlungen zu Weimar that the United States has given implied recognition to the GDR in supporting the admission of both the Federal Republic and the GDR to the United Nations. The discussion in the Memorandum focuses, instead, on changes in the relations be-

1. The first decision in the district court (Pet. 6a-11a) held that the unrecognized government of the German Democratic Republic (GDR) could not itself appear as a litigant, but left for further proceedings, which eventually included depositions in Vienna of East German witnesses, the factual question of the relationship between the Kunstsammlungen zu Weimar and the GDR. In the second decision (Pet. 11a-15a) the district court found the Kunstsammlungen to be an arm and instrumentality of the GDR, given corporate status to facilitate suit, and excluded it.

tween the two Germanys.[2] However, the issue decisive in the district court and the court of appeals was the fact of non-recognition, and that fact, as the Memorandum makes clear by plainest implication, has not changed. The original Suggestion of Interest of the United States, the substance of which is quoted at pages 2 and 3 of the Memorandum, is unrevoked.

The Memorandum nonetheless states that the Executive Branch would not object to a remand with a direction to permit the Kunstsammlungen to intervene.[3] The principle thus urged by the Memorandum (if it can be said that the Memorandum rests upon anything other than the *ipse dixit* of the Executive Branch) is necessarily the startling if

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2. The Memorandum is disingenuously imprecise as to what changes in relations between the Germanys it has reference to. While the Kunstsammlungen, in papers filed in the district court, called attention to the developing *Ostpolitik* of the Brandt government, the principal event no doubt is the so-called Treaty on Fundamental Relations or *Grundvertrag*, which was signed in December, 1972. This event thus substantially antedated the presentation of the appeal in the court of appeals, which heard the case in April, 1973, and was a circumstance heavily relied on in the brief to the court of appeals of the Kunstsammlungen. (The passage on this subject from pages 18 and 19 of the Kunstsammlungen's brief to the court of appeals is set out in Annex A to this reply brief). A copy of the text of the treaty was submitted to the court of appeals in connection with the Kunstsammlungen's unsuccessful application to that court dated March 8, 1973, for a stay of proceedings. The principal event in these changed German relations was thus as much a part of the "record as it then stood" in the court of appeals as it is in this Court. Yet the Memorandum concedes the correctness, on that record, of the decision in the court of appeals, while finding it possible to argue here that "significant changes" justify vacating that decision and, in effect, reversing it in result.

3. In so doing, but without so stating, the Solicitor General asks this Court to grant the writ of certiorari and to rule on aspects of intervention which have been passed on by neither the district court nor the court of appeals, which found it unnecessary to reach them in light of the conclusion that the Kunstsammlungen was in any event disqualified as a litigant. See Pet. 11a.

unadvertised novelty that despite non-recognition the courts should (must?) admit as litigants non-recognized governments (and their instrumentalities) where "significant changes" in the relations of those non-recognized governments with other foreign governments have occurred. The doctrine of non-recognition, which has as its justification a concern for the relations between the United States and a foreign government not yet recognized by the United States, see *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 410-11 (1964), is thus wholly (and inexplicably) transformed. And because the new formulation of it is dependent on facts or views of the relations *inter sese* of foreign governments to which the courts have no access, the doctrine becomes not only meaningless but judicially unmanageable.

In short, what is proposed is a manipulation of the doctrine of non-recognition at whim. A clear majority of the Court has recently rejected very nearly identical reasoning in refusing to approve the so-called Bernstein exception to the act of state doctrine. *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 772 (Douglas, J., concurring: "the Executive Branch 'cannot by simple stipulation change a political question into a cognizable claim' "); *id.* at 773 (Powell, J., concurring: ". . . I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine"); *id.* at 778 (Brennan, J., with whom Stewart, Marshall and Blackmun, JJ., joined, dissenting: "[The Bernstein exception] would require us to abdicate our judicial responsibility to define the contours of the act of state doctrine so that the judiciary does not become embroiled in

the politics of international relations to the damage not only of the courts and the Executive but of the rule of law").

If the Executive Branch were prepared to urge the abandonment of the doctrine of non-recognition, it might reasonably be expected to say so plainly enough to be understood. The Memorandum obviously urges no such proposition, confining its suggestion to the expediencies of this suit alone. If the doctrine is to be retained, it can serve as a principle to be applied by courts only if it remains capable of formulation by reference to objective circumstances which a court, in the exercise of a traditional judicial function, can identify, appraise and apply generally in all appropriate cases. The Memorandum suggests no content for the doctrine consistent with that requirement.

2. To accept the result suggested in the Memorandum would reward calculated delay, prejudice private rights and subvert the doctrine of finality.

The record demonstrates how tardily the Kunstsammlungen has pressed its claim to litigant status, first raised nearly five years ago in April, 1969. In the course of proceedings concerned with that claim, the parties have been subjected to the delay and expense of depositions in Vienna, hearings in the district court preceding the two decisions, and an appeal to the court of appeals which was presented only after extensions of time and the exhaustion at each step of all or very nearly all of the maximum time available. The decision of the court of appeals affirming the district court was preceded by an unsuccessful effort to obtain an indefinite stay and followed by an unsuccessful application for rehearing and a suggestion for rehearing en banc. The petition to this Court, in turn, was filed only after unsuc-

cessful efforts to obtain extensions of time to file or in the alternative a stay of proceedings here.

The course now suggested by the Memorandum that the decision be vacated and the case remanded with a direction that the Kunstsammlungen be permitted to intervene, would constitute the plainest invitation to an unrecognized government in any subsequent case to impede the progress of litigation in the courts, in hopes of ultimate recognition, or, failing that, in hopes merely of a change in its relationship with some other foreign government. The expense and delay to the respondent in this case have already been large. Now to be told, as is suggested, that "new relationships" between two foreign governments, rather than recognition by the United States, impel the reversal of "correct decisions" in the courts below predicated upon non-recognition that continues to date, would properly invite sharp criticism of the judicial process.

3. There is no occasion for granting the writ.

None of the guidelines for granting of the writ, laid down in Rule 19, are met in this case. Far from involving a conflict with other decisions or other applicable law, or a novel question of federal law requiring a decision here, or a departure from the accepted and usual course of judicial proceedings, the decisions below are conceded to have been "correct" on the record on which they rested. The critical fact in that record, the non-recognition of the GDR, is unchanged. A grant of the writ in this case could only serve to cast unexplained doubt on the doctrine of non-recognition as it has been consistently applied for more than a century.

If recognition is sought by the GDR and granted by the United States, the courts can take appropriate note of it. If as a consequence of that event, should it occur, rights be thought to be conferred upon the Kunstsammlungen in

respect of matters at issue in this litigation, an appropriate application can be made to the district court. There is no need for this Court to provide a remedy in anticipation of that necessarily problematical future event.

CONCLUSION

For the reasons stated above, and in the respondent's principal brief in opposition to the petition, the writ prayed for should be denied.

New York, New York
January 24, 1974

Respectfully submitted,

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ANNEX A

[Annex A consists of the text of a passage from pages 18 and 19 of the Brief for the Kunstsammlungen zu Weimar to the United States Court of Appeals for the Second Circuit dated February 23, 1973.]

One final word should be said. At this moment, in February 1973, there is not only no justification for denying to the GDR government the right to sue, there is every reason to grant it that right. This Court can take judicial notice of the following recent significant developments:

1. The governments of the United States and the GDR are fellow signatories to at least one multilateral agreement (66 Dep't of State Bulletin 645 (May 1, 1972)).

2. In early November 1972, the United States joined in a four-power statement (with the United Kingdom, France and the Soviet Union) declaring its intention to support the application of the GDR government for membership in the United Nations (20 The Bulletin (Bonn) 304 (November 14, 1972)).

3. In November 1972, the GDR government was granted the right to seat a Permanent Observer at the United Nations, and it now has such a representative in attendance there (N.Y. Times, Jan. 5, 1973, at 1, col. 1).

4. On November 21, 1972, the GDR government was admitted to membership in UNESCO (N.Y. Times, Nov. 22, 1972, at 4, col. 7).

5. On December 21, 1972, the governments of the GDR and the Federal Republic of Germany signed a treaty in which each recognizes the other as a legitimate sovereign government and establishes a full system of relations with

the other (N.Y. Times, Dec. 22, 1972, at 1, col. 8). (The treaty, in unofficial translation, appears in 20 The Bulletin (Bonn) 293 (November 14, 1972).)

6. The United States government is now negotiating (or is about to commence negotiations) for the establishment of diplomatic relations with the GDR government (N.Y. Times, Jan. 5, 1973, at 1, col. 1).

7. More than seventy States (including most recently the United Kingdom and France) have established diplomatic relations with the GDR government as the legitimate sovereign government for East Germany (N.Y. Times, Feb. 10, 1973, at 14, col. 4).[1]

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1. Among the other States which recently established diplomatic relations with the GDR government are:

Australia (Dec. 22, 1972)	Norway (Jan. 17, 1973)
Austria (Dec. 21, 1972)	Peru (Dec. 28, 1972)
Belgium (Dec. 27, 1972)	Spain (Jan. 10, 1973)
Denmark (Jan. 9, 1973)	Sweden (Dec. 21, 1972)
Finland (Dec. 8, 1972)	Switzerland (Dec. 20, 1972)
Netherlands (Jan. 6, 1973)	Tunisia (Dec. 17, 1972)
Uruguay (Dec. 24, 1972)	